SUBSTANTIVE INSOLVENCY RULES (II)

Judgment of 16 April 2015, C-557/13, Hermann Lutz v. Elke Bäuerle, acting as liquidator of ECZ Autohandel GmbH,

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1. Introduction and facts of the case

The ECJ has already referred to substantive insolvency rules of the Insolvency Regulation in the past[1]. In its new Judgment of 16 April 2015, C-557/13, Hermann Lutz v. Elke Bäuerle, acting as liquidator of ECZ Autohandel GmbH, the ECJ has pronounced a decision concerning the limitations to actions to set aside an act detrimental to the interests of the creditors.

In particular, the ECJ has interpreted Art. 13 of the Insolvency Regulation: "Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that: - the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and - that law does not allow any means of challenging that act in the relevant case." [2] The text of Art. 13 of the Insolvency Regulation will survive under Art. 16bis of the new Insolvency Regulation (848/2015, of 20 May 2015), which will be applicable as from 26 June 2017[3].

The facts were as follows[4]: ECZ GmbH was a German company with registered office in Tettnang (Germany) whose object was the sale of cars. The debtor company in the present case is a subsidiary established in Bregenz (Austria) of ECZ GmbH. Mr Lutz purchased a car from that company. Owing to the failure to deliver that car, Mr Lutz brought an action before the Bezirksgericht Bregenz (District Court, Bregenz), seeking reimbursement of the price which he had paid to that company. On 17 March 2008, the District Court of Bregenz issued an enforceable payment order against that company for EUR 9,566 plus interest. On 13 April 2008, the debtor company filed an application before the Amtsgericht Ravensburg (District Court, Ravensburg, Germany) for insolvency proceedings to be opened. On 20 May 2008, the Court of Bregenz having granted leave to enforce its payment order of 17 March 2008, three bank accounts held by the debtor company at a bank established in Austria were attached. The attachment was notified to that bank on 23 May 2008. On 4 August 2008, the Court of Ravensberg

[1] See in this webpage section: 'Substantive insolvency rules', examining Judgment of 19 September 2013, C-251/12, Christian Van Buggenhout and Ilse Van de Mierop, acting as liquidators in the insolvency of Grontimmo SA, v Banque Internationale à Luxembourg SA.
[2] Art. 4.1 and 4.2(m) "1. Save as provided in this regulation, the law pplicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings'. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular: ... (m) the rules relating to the voidness, voidability or unenforce- ability of legal acts detrimental to all the creditors."
[3] OJ L141, 5 June 2015.
[4] Paras 11-21 *Hermann Lutz*.

opened insolvency proceedings against the debtor company. On 17 March 2009, the bank holding the debtor company's bank accounts that had been attached paid Mr Lutz the sum of EUR 11,778.48. By a letter of 10 March 2009, the liquidator had given notice to that bank that he reserved the right to challenge, in connection with the insolvency, any payment made in favour of the debtor company's creditors. By a letter of 3 June 2009, the liquidator informed Mr Lutz that he was challenging the enforcement which had been authorised on 20 May 2008 by the District Court of Bregenz, and also the payment made on 17 March 2009. On 23 October 2009, the liquidator of the debtor company, brought an action in Germany against Mr Lutz seeking to have the transaction set aside and recovery of the total sum paid to him on 17 March 2009. The Landgericht Ravensburg (Ravensburg Regional Court) upheld the action. Mr Lutz lodged an appeal against the decision of the Ravensburg Regional Court but his appeal was unsuccessful. He then appealed on a point of law to the Bundesgerichtshof (Federal Court of Justice), continuing to seek the dismissal of that action. The referring court considers that the outcome of the appeal depends on the interpretation of Article 13 of Regulation No 1346/2000, on the assumption that Art. 13 is applicable to the facts in the main proceedings. In that regard, the referring court observes that, in the dispute in the main proceedings, according to the applicable *lex fori concursus*, in the present case Paragraph 88 of the InsO, the right to attach the credit balance on the debtor company's bank accounts became legally invalid on the date when the insolvency proceedings against that company were opened, since that attachment was authorised and effected after the application to open those proceedings. The referring court states that the subsequent payment of the attached sum from the balance on the bank accounts is therefore also invalid. The referring court adds that, according to Mr Lutz, who relies on Article 13 of Regulation No 1346/2000, the payment at issue in the main proceedings can no longer be challenged under the law applicable to that payment, namely Austrian law. Paragraph 43(2) of the IO lays down a limitation period of one year, from the date when the insolvency proceedings were opened for commencing an action to set aside the transaction. The referring court notes that that period was not respected in the case in the main proceedings. The referring court observes that, by contrast, under German law, the limitation period for bringing an action to set a transaction aside is three years and that, in the case in the main proceedings, that period was respected.

2. A preliminary issue: relationship between Articles 4.2(m), 5 and 13 of the Insolvency Regulation

The ECJ started by settling the preliminary basis of the question, for the characterization was needed of Mr Ludz rights after the attachment of the bank account was. The Austrian Federal Court of Justice implicitly assumed that "the right to attach bank accounts by virtue of enforcement constitutes a 'right in rem' capable of being protected under Article 5(1) of Regulation No 1346/2000"[5]. The ECJ said that according to Art. 5.2 and Recital 25 "the right resulting from the attachment of the bank accounts at issue in the main proceedings was in fact capable of constituting a 'right in rem' within the meaning of Article 5(1) of Regulation No 1346/2000, provided that, under the national law concerned (in the present case, Austrian law), that right was exclusive in relation to the other creditors of the debtor company, which is a matter for the referring court to ascertain."[6] Nevertheless, Art. 5.4 of the Insolvency Regulation

[5] Para 25 *Hermann Lutz*.
[6] Para 28 *Hermann Lutz*.

reserves Art. 4.2(m) quoted above[7]. The ECJ makes clear that taking account of the different languages of the Insolvency Regulation Art. 5.4 cannot be restricted to procedural actions and that encompasses all legal actions, thus allowing entrance also to Art. 13: "[I]n the majority of language versions of Article 5(4) of Regulation No 1346/2000, to 'actions' for voidness, voidability or unenforceability does not indicate that the scope of that provision is limited solely to court actions. That provision should be read in conjunction with Article 4(2)(m) of that regulation, which refers generally to 'the rules relating to … voidness, voidability or unenforceability' and not solely to 'actions' for voidness, voidability or unenforceability. Consequently, in order to determine whether the voidness, voidability or unenforceability of an act may result from legal action, from another legal measure or even from the effect of law, reference should be made to the competent *lex fori concursus* for determining, in accordance with Article 4(2)(m) of Regulation No 1346/2000, the rules relating to voidness, voidability or unenforceability. On that last point, it should be added that, whereas Article 4(2)(m) of Regulation No 1346/2000 provides that the *lex fori concursus* determines the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors, Article 13 of that regulation, to which Mr Lutz refers, allows an exception to that rule, since it rules out the application of Article 4(2)(m) of that regulation and applies the law governing the act challenged by the liquidator ('the *lex causae*'), when certain conditions are satisfied. The questions asked by the referring court should therefore be answered in such a way as to enable the referring court to also establish whether the application of Paragraph 88 of the InsO and, therefore, the automatic invalidity of the attachment of the bank accounts at issue in the main proceedings are not excluded because of the application, under Article 13 of Regulation No 1346/2000, of Austrian law."[8]

3. Art. 13 Insolvency Regulation: chronological requirements

Is Art. 13 applicable when the attachment creating a *ius in rem* is of a later date than the opening of the insolvency proceedings? The answer is affirmative. The ECJ first notes that Art. 13 lacks any time reference[9] but it also notes that Art. 13 is an exception that "must be interpreted strictly, and its scope cannot go beyond what is necessary to achieve that objective"[10]. Taking into account that "[t]o interpret Article 13 of Regulation No 1346/2000 as also applying to acts which took place after the opening of insolvency proceedings would go beyond what is necessary to protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened" since "as from the opening of insolvency proceedings, the creditors of the debtor concerned are able to predict the effects of the application of the *lex fori concursus* on the legal relations which they maintain with that debtor"[11], Art. 13 "is not, in principle, applicable to acts which take place after the opening of insolvency proceedings."[12]

Nevertheless, this refers to the payment made to Mr Ludz (17 March 2009), not to the attachment in itself (20 May 2008), which took place before the insolvency proceedings initiated on 4 August 2008. As underlined supra section 1, the characterization of the

[7] See *supra* footnote 2.
[8] Paras 30-31 *Hermann Lutz*.
[9] Para 33 *Hermann Lutz.*
[10] Para 34 *Hermann Lutz.*
[11] (Both fragments) Para 35 *Hermann Lutz.*
[12] Para 36 *Hermann Lutz.*

attachment as a *ius in rem* according to Austrian law is of relevance. Therefore the EJC elaborates on this point: "Since that right to attach was established before the opening of the insolvency proceedings against the debtor company, that act could benefit, according to the provisions of Regulation No 1346/2000, from special protection. As stated in recital 25 of Regulation No 1346/2000, the legislature intended to provide for a special reference diverging from the *lex fori concursus* in the case of rights in rem, since these rights are of considerable importance for the granting of credit. According to the same recital, the proprietor of a right in rem accrued before the opening of the insolvency proceedings should therefore be able to continue to assert, after that opening, his right to segregation or separate settlement of the collateral security. In order to achieve that objective, Article 5(1) of Regulation No 1346/2000 states that the opening of insolvency proceedings 'shall not affect' the rights in rem falling within the scope of that provision. Obviously, that rule seeks, inter alia, to enable the creditor to assert, effectively and even after the opening of insolvency proceedings, a right in rem established before the opening of those proceedings. However, in order to enable a creditor to assert his right in rem effectively, that creditor must be able to exercise that right after the opening of the insolvency proceedings, in principle under the *lex causae*. The special feature of Article 5 of Regulation No 1346/2000 is thus that it seeks to protect not only acts completed before the opening of the insolvability proceedings but also, and above all, acts taking place after the opening of those proceedings. It should be added in that regard that, although Article 20(1) of that regulation states that a creditor who, after the opening of the insolvency proceedings, has obtained total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of a Member State other than the State of the opening of proceedings is to return what he has obtained to the liquidator, that same provision states that the creditor's obligation to return is 'subject', inter alia, to Article 5 of that regulation. Therefore, Article 20(1) of that regulation is not relevant in the case in the main proceedings. Consequently, since Article 5 of Regulation No 1346/2000 covers, inter alia, acts carried out after the opening of insolvency proceedings, the considerations set out in paragraphs 33 to 36 of the present judgment, according to which Article 13 of that regulation does not, in principle, apply to acts which took place after the opening of those insolvency proceedings, cannot be applied to the situation in which a creditor exercises a right in rem falling within Article 5(1) of that regulation. Accordingly, although Article 5(4) of Regulation No 1346/2000, read in conjunction with Article 4(2)(m) of that regulation, permits the bringing of an action for voidness, voidability or unenforceability of an act which has as its object the exercise of a right in rem after the opening of insolvency proceedings, those provisions must be interpreted, in order to ensure the effectiveness of Article 5(1) of that regulation, as not precluding the creditor from relying on Article 13 of that regulation in order to claim that the act concerned is subject to the law of a Member State other than that of the State of the opening of proceedings and that that law does not allow any means of challenging that act in the relevant case. In those circumstances, the answer to the first question is that Article 13 of Regulation 1346/2000 must be interpreted as applying to a situation in which a payment, challenged by an insolvency administrator, of a sum of money attached before the opening of the insolvency proceedings was made only after the opening of those proceedings."[13]

4. *Art. 13 Insolvency Regulation: time-bars covered by the exception*

Is Art. 13 applicable to limitation periods or other time-bars relating to actions to set aside transactions under the *lex causae*? The answer is affirmative again. The ECJ

[13] Paras 37-43 *Hermann Lutz.*

first notes that Art. 13 makes no distinctions between limitation periods and other time-bars relating to actions to set aside transactions[14]. It also notes that "whilst Article 12(1)(d) of the Rome I Regulation states that prescription and limitation of actions are governed by 'the law applicable to a contract', it must be held that those provisions do not apply to actions to set transactions aside falling within Articles 4 and 13 of Regulation No 1346/2000. Those articles constitute a *lex specialis* in relation to the Rome I Regulation and must be interpreted in the light of the objectives pursued by Regulation No 1346/2000."[15] The ECJ is therefore driven to solve a classic conflict of characterization: "since Article 13 of Regulation No 1346/2000 draws no distinction between substantive and procedural provisions and does not contain, in particular, any criterion for identifying periods of a procedural nature, the classification of a period as procedural or substantive should necessarily be made under the *lex causae*. However, as the Commission essentially observed, if Article 13 of Regulation No 1346/2000 were to be interpreted as meaning that periods classified by the *lex causae* as procedural periods are excluded from the scope of that article, that interpretation would lead to arbitrary discrimination according to the legal-theory models adopted by the Member States. In addition, and irrespective of whether it is for the *lex fori concursus* or the *lex causae* to ascertain whether a period is of a procedural or substantive nature, that interpretation would clearly prevent a uniform application of Article 13 of Regulation No 1346/2000. In those circumstances, the answer to the second question is that Article 13 of Regulation No 1346/2000 must be interpreted as meaning that the defence which it establishes also applies to limitation periods or other time-bars relating to actions to set aside transactions under the *lex causae*."[16]

5. *Art. 13 Insolvency Regulation: procedural aspects*

Finally, is Art. 13 applicable to the relevant procedural requirements for the exercise of an action to set a transaction aside? In other words, are these requirements to be appraised according to the *lex causae* governing the right of the creditor or according to the *lex fori concursus*? Again the ECJ notes that nothing in the language of Art. 13 allows for distinguishing between procedural and substantive effects[17]. Moreover from the point of view of characterization, "formal rules may be substantive or procedural in nature"[18], where Art. 13 draws no distinction[19]. "Consequently, with regard more particularly to Austrian law, the obligation, laid down in Paragraph 43(2) of the IO, to bring an action to set a transaction aside within one year after the opening of insolvency proceedings may be regarded not only as aiming to facilitate proof of compliance with that period, but also as a substantive condition for bringing such an action. [...] In addition, the procedural conditions to which actions for voidness, voidability or unenforceability of an act are subject may also seek to protect public interests, such as the interest in ensuring adequate publicity of those actions with a view to protecting the legitimate expectations not only of the persons against whom those actions are brought but also of the third-party purchasers of goods which are the subject of those actions. As is apparent from recital 24 of Regulation No 1346/2000, the objective of the exceptions to the application of the *lex fori concursus*, including the exception laid down in Article 13 of that regulation, is precisely to protect legitimate

[14] Para 45 *Hermann Lutz.*
[15] Para 46 *Hermann Lutz.*
[16] Paras 47-49 *Hermann Lutz.*
[17] Para 51 *Hermann Lutz.*
[18] Para 52 *Hermann Lutz.*
[19] Para 53 *Hermann Lutz* (see also section *4 supra*).

expectations and the certainty of transactions in Member States other than that in which the insolvency proceedings are opened. Since, as is apparent from paragraph 46 of the present judgment, the provisions of the Rome I Regulation do not apply to the case in the main proceedings, the classification of a given requirement as a procedural requirement, and also the determination of the objectives pursued by that requirement, should therefore be matters for the *lex causae*. To interpret Article 13 of Regulation No 1346/2000 as meaning that requirements classified as procedural requirements by the *lex causae* must be excluded from the scope of that article would again lead to arbitrary discrimination on the basis of the legal-theory models adopted by the Member States and would prevent a uniform application of that article. In the light of the foregoing, the answer to the third question is that the relevant procedural requirements for the exercise of an action to set a transaction aside are to be determined, for the purposes of the application of Article 13 of Regulation No 1346/2000, according to the *lex causae*."[20]

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[20] Paras 54-56 *Hermann Lutz.*